92-419

Supreme Court, U.S.
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No. 92 -

IN THE

Supreme Court of the United States

ADMINISTRATOR OF THE NEW YORK CITY DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

- against -

ABBOTT HOUSE, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 896 -- August Term 1990

(Petition for rehearing filed October 8, 1991 Granted June 3, 1992 by vacating Opinion filed September 24, 1991, 944 F.2d 1028 (2d Cir. 1991) and replacing it with the following opinion)

Docket No. 90-7698

SHIRLEY WILDER; THOMAS EDWARDS, and SHARON RODWELL; BARRY PARKER; by his mother and next friend, MADELINE BUTLER; ROBIN HERBERT, by her mother and next friend; NANCY HERBERT; SHEDRICK ROBERTS, by his mother and next friend; ANNIE ROBERT; CHRISTOPHER TORIAN, by his mother and next friend; LILLIAN TORIAN, on their own behalf and on behalf of all others similarly situated; DR. KENNETH CLARK, REV. HOWARD MOODY, DR. RICHARD CLOWARD, MILDRED DAVIS,

Plaintiffs,

- against -

BLANCHE BERNSTEIN, individually and as Administrator of the; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; THE CITY OF

NEW YORK; THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; BARBARA BLUM, individually and as commissioner of the; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; BEVERLY SANDERS, individually and as Administrator of; SPECIAL SERVICES FOR CHILDREN; CAROL PARRY; ELIZABETH BEINE; LINDA MARINO, individually and as Director of the Office of Allocations and Accountability of Special services for Children, ARTHUR LEVITT, as comptroller of the State of New York; HARRISON J. GOLDIN; as Comptroller of the City of New York, PAULA RABINOW, individually and as Director of the Joint Planning Service; SANDRA HOWARD, individually and as Supervisor of the Central referral unit; SISTER MARY FRANCENE, individually and as Administrator of the Angel Guardian Home; SISTER SHEILA, individually and as Executive Administrator of Astor Home for children; FRED APERS, individually and as Executive Director of Cardinal Hayes Home for Children; JOHN DEMARTINO, individually and as Executive Director of Cardinal McCloskey school and home for children; JAMES P. O'NEILL, individually and as executive director of catholic guardian society; CATHERINE WHITE, individually and as director of catholic guardian society of the diocese of Brooklyn; SISTER UNA MCCORMACK, individually and as executive director of catholic home bureau for dependent children; DR. JEROME GOLDSMITH, individually and as executive director president of Jewish Board of Guardians; ABE LAVINE, individually and as executive vice president of Jewish Child care; ASSOCIATION OF NY; JACOB TROBE; BROTHER BRENDAN BREEN,

individually and as administrator of Lincoln Hall; BROTHER CHRISTOPHER FOLEY; RALPH CHILLION, individually and as Director of Little Flower Children's services; SISTER ROSALIE MCNAUGHTON, individually and as executive director of McMahon services for children; SISTER MARY JAMES, individually and as administrator of Madonna Heights School for Girls; KENNETH A. MILLER, individually and as director of Maimonides Residential Centers; ISAAC MAIZES; SISTER MARY CHRYSOSTOM, individually and as administrator of Mercy Home for Children; BATHSHEVA MANDEL, individually and as director of Mishkon B'Nai Y'Israel; MONSIGNOR EDMUND F. FOGARTHY, individually and as Executive director of Mission of the Immaculate Virgin; SISTER MARIAN CECILIA SCHNEIDER, individually and as Executive Director of the New York Foundling Hospital; LESTER KAUFMAN, Individually and as Executive Director of Ohel Children's Home; HUGH WALLACE, individually and as Residence Director of Pius XII school; BROTHER ROBERT FONTAINE; DENIE BARRY, individually and as Executive Director of St. Agatha Home for Children; ROSEMARY A. SHERIDAN, individually and as executive director of St. Cabrini Home Inc.; ROBERT J. MCMAHON, individually and as Executive Director of St. Christopher's Home; SISTER MARY PATRICK, individually and as executive director of St. Dominic's Home; SISTER MARY SHEILA, individually and as director of St. Germaine's Home; BROTHER THOMAS TRAGER, individually and as Executive director of St. John's Residence and school for boys; SISTER RITA MEANEY, individually and as

administrator of St. Joseph's Children services; SISTER MARITA PAUL, individually and as executive director of St. Joseph's home of Peekskill; SISTER MARY OLIVA, individually and as administrator of St. Mary's of the angels home; EMANUEL J. STARACE, individually and as executive director of St. Michael's Home; SISTER DELLA MAE QUINN, R.S.M.; REV. ROBERT M. HARRIS, individually and as administrator of St. Vincent's Hall; JOSEPH ALTHEIMER, individually and as administrator of sister of the good shepherd residences,

Defendants-Appellants,

ABBOTT HOUSE, BERKSHIRE FARM CENTER & SERVICES FOR CHILDREN, BROOKLYN HOME FOR CHILDREN, BROOKWOOD CHILD CARE, EPISCOPAL MISSION SOCIETY, GREEN CHIMNEYS CHILDREN'S SERVICE, HEARTSEASE HOME, INC., INWOOD HOUSE, LAKESIDE SCHOOL, LOUISE WISE SERVICES, LUTHERAN COMMUNITY SERVICES, PUERTO RICAN FAMILY ASSOCIATION, ST. CHRISTOPHER-JENNIE CLARKSON CHILD CARE SERVICES, SHELTERING ARMS CHILDRENS SERVICE, SOCIETY FOR SEAMAN'S CHILDREN, SPENCE-CHAPIN SERVICES TO CHILDREN, TALBOT PERKINS CHILDREN'S SERVICES, THE CHILDREN'S AID SOCIETY, and THE CHILDREN'S VILLAGE,

Intervenors-Appellees.

Before: OAKES, *Chief Judge*,
CARDMONE and WALKER, *Circuit Judges*

The City of New York appeals from an order of the United States District Court for the Southern District of New York (Ward, J.) entered June 29, 1990, awarding attorneys' fees to a group of intervenors under 42 U.S.C. § 1988.

Remanded

ELIZABETH DVORKIN, New York, New York (Victor A. Kovner, Corporation Counsel of the City of New York, Stephen J. McGrath, Francis F. Caputo, New York, New York, of counsel), *for Defendants-Appellants.*

DONALD J. COHN, New York, New York; (Bruce Topman, Webster & Sheffield, New York, New York; Stephen Wise Tulin, Polier, Tulin, Clark & Zalk, New York, New York, of counsel), *for Intervenors-Appellees.*

CARDAMONE, *Circuit Judge*:

This panel had before it last year an appeal by the City of New York (City or appellant) from a June 29, 1990 order of the United States District Court for the Southern District of New York (Ward, J.) awarding $355,388.85 in attorneys' fees to appellees-intervenors, a group of 19 private child care agencies.[1] We were asked

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[1] The intervenors group consists of the following agencies: Abbott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, The Children's Aid Society, The Children's Village, Episcopal Mission Society, Green Chimneys Children's Service, Heartsease Home, Inc., Inwood House, Lakeside School, Louise Wise Services, Lutheran Com-

(Footnote Continued)

on that appeal to determine whether the intervenor group, which contributed importantly to the formation of the settlement we had previously approved in *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988), was entitled to such an award under 42 U.S.C. § 1988 (1988). In a decision by a divided panel (Oakes, C.J., dissenting), we reversed the intervenors' award. *See Wilder v. Bernstein*, 944 F.2d 1028 (2d Cir. 1991).

Subsequently, a petition for a rehearing with a suggestion for rehearing *en banc* was filled by intervenors. Upon further reflection we are all now convinced, primarily by the views expressed by the Chief Judge in his dissenting opinion, that the intervenors are entitled to an award of attorneys' fees. The petition for rehearing is therefore granted. Our prior opinion reported at 944 F.2d 1028 reversing the district court order of June 29, 1990 is vacated and replaced with the following opinion, which prior to its filing has been circulated to all the active and senior judges of this Court. The case must nonetheless be remanded to the district court for it to sort out what should be the amount of those fees. We set forth guides for that purpose later in this opinion to inform the district court in the exercise of its discretion.

BACKGROUND

The facts are set forth in Judge Ward's thorough opinion reported at 725 F. Supp. 1324 (S.D.N.Y. 1989), with which we assume the reader's familiarity, as well as in his opinion approving the settlement of the underlying

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(Footnote Continued)
munity Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seamen's Children, Spence-Chapin Service to Children, and Talbot Perkins Children's Service.

lawsuit, reported at 645 F. Supp. 1292 (S.D.N.Y. 1986). We recount only those facts relevant to this appeal.

The underlying litigation commenced in 1973 when New York City's child care placement system was challenged by a group of plaintiffs representing a class of Protestant Black children. Plaintiffs ultimately asserted in their complaint four grounds on which they attacked the City's foster care system: (1) the child care system operated to discriminate against children based on race, (2) it discriminated on the basis of religion, (3) it amounted to an establishment of religion, and (4) it unduly burdened the free exercise rights of Protestant children. The complaint sought declaratory and injunctive relief under 42 U.S.C. § 1983, 1985, and 1986, and 28 U.S.C. § 2201 and 2202. The matters alleged in the complaint were claimed to violate the First and Fourteenth Amendments of the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982), and New York anti-discrimination regulations, 18 N.Y.C.R.R. § 303.1, 303.2 (1978).

In this complex litigation many groups became involved to varying degrees and for varying reasons. The main participants were (1) plaintiffs, a group of Protestant Black children in need of care outside their homes; (2) defendants New York City and municipal officials responsible for the City's child care system; (3) defendants administrators of private, religiously affiliated, either Jewish or Catholic, child care agencies (defendant agencies); and (4) intervenors administrators of 19 private child care agencies. Among the intervenors were former defendant agencies who had been previously dismissed from the action with prejudice, some who had been dismissed without prejudice, and others who had never before been involved in the action.

In the summer of 1983, shortly before trial was scheduled to begin, plaintiffs and the City began negotiations in an attempt to reach a settlement. At that time intervenors had in their care 4,600 children constituting 25 percent of the 17,000 children then in the City's foster care system. Most of those in intervenors' care were Black Protestant children and belonged therefore to the plaintiff class. In January 1984 some of the eventual intervenors wrote to the Corporation Counsel of New York City expressing strong objections to drafts of the settlement negotiated by it and plaintiffs. In April of that year plaintiffs and the City presented a proposed stipulation of settlement to the district court. The settlement ignored comments and suggestions made by the intervenor agencies, and was objected to by the defendant agencies and by intervenors. Intervenors continued to press their objections and, on June 15, 1984, were granted leave to intervene "for the limited purpose of opposing the proposed settlement."

We digress for a moment to discuss how leave to intervene came about. Although no petition for intervention was filed, letters, memoranda and affidavits objecting to the stipulation were submitted prior to the date intervention was ordered. The customary terms of either "plaintiff-intervenor" or "defendant-intervenor" were not used to refer to the intervenors. Nor does the district court's order set forth on what grounds and under which section of Fed. R.Civ. P. Rule 24 they were permitted entry into the action. In the case of at least some of the former defendant intervening agencies, the original parties had agreed in the decree permitting their dismissal that the dismissed agencies would receive reasonable notice of any proposed settlement and would be permitted, as of right, to appear and participate in any settlement proceeding. The district court considered the

intervenors "nonparties vis-a-vis the underlying constitutional claims in the lawsuit" and, despite their constitutional objections, stated the intervenors joined the lawsuit for the "sole purpose of objecting to the Stipulation on clinical grounds," 645 F. Supp. at 1350.

Nevertheless, it is plain from intervenors' 41 comprehensive objections to the proposed stipulation of settlement that the foster care children's constitutional rights were raised. Some objections were addressed, it is true, solely to the administrative unworkability of the settlement. But a number of objections challenged the stipulation's failure to consider adequately the needs of the children served, and its discrimination on equal protection and religious grounds. For example, intervenors alleged

> 9. ... the Stipulation will reduce the level of care provided to all children and families in the system.
>
> 10. [Twelve paragraphs] taken together authorize provision of their parents' religious beliefs in violation of the First and Fourteenth Amendments to the Constitution of the United States.
>
> ...
>
> 16. The incorporation of . . . the Preferred Placement System... to rank agencies has no place in a federal court order in an action alleging racial and religious discrimination.
>
> 17. No agency should refuse to provide care to any child by reason of such child's race or religion and SSC shall not permit any agency with which it contracts to do so.
>
> ...

19. Paragraph 14 improperly treats transfers to more restrictive placements differently from transfers to less restrictive placements although either may be equally sound for different children.

Some objections were of a mixed variety, raising issues going to the clinical and administrative interests of the agencies as well as to the best interests, constitutional and otherwise, of the children.

Negotiations, in which intervenors then participated, continued through the summer of 1984. In August basic agreement on general topics was reached. The parties continued to negotiate, this time in open court, and in January 1985 a stipulation of settlement was submitted. On October 8, 1986, over the objections of the defendant agencies, the district court approved the stipulation of settlement. On appeal, we affirmed. 848 F.2d 1338.

On March 17, 1989 intervenors moved for attorneys' fees as prevailing parties under § 1988. Specifically, they sought from the City fees of $416,052.50, enhanced by a factor of 1.75 for a total of $775,303.50, disbursements of $17,020.59, and continuing City liability for fees related to enforcement of the decree. The City opposed the application, asserting that intervenors were not a prevailing party because they had no federal constitutional or statutory rights within the meaning of 42 U.S.C. § 1988 (1988) at stake in the litigation. The City had already paid plaintiffs $1,775,000 in attorneys' fees and costs pursuant to an offer of judgment submitted by the City in late June 1989, which was accepted by plaintiffs shortly thereafter.

In its opinion approving the stipulation of settlement and in its opinion awarding attorneys' fees to

intervenors, the district court detailed intervenors' extensive contributions in reaching the settlement finally accepted by all participants, except the defendant agencies. 725 F. Supp. at 1327-29. Because they had "no axes to grind," the district court stated, intervenors were able to measure the proposals according to the best interests of the children and provide it with valuable insights into the clinical and administrative realities of child care. The stipulation of settlement finally adopted, while adhering to the general outline of the original stipulation, was influenced considerably by the concerns aired by intervenors and reflected "'numerous changes -- some minor, some substantial -- that address virtually all of the concerns raised by the intervenors.'" 725 F. Supp. at 1329 (quoting 645 F. Supp. at 1348).

Given their "comprehensive" and "detailed" efforts, their "integral and essential role," and their "significant impact" on the creation of a remedy that vindicated the civil rights of the children and their families in the foster care system, the district court held that the intervenors were therefore prevailing parties entitled to an award of attorneys' fees and costs. It disagreed with intervenors' computation of those fees and denied their request for an enhancement factor. Instead it awarded fees in the amount of $355,388.85 and disbursements of $10,212.35. It is from that decision that the City appealed. We now remand the question of the amount of the award of attorneys' fees to the district court.

DISCUSSION

A. An Intervenor May Be a Prevailing Party

The City challenges the trial court's threshold conclusion that intervenors were a prevailing party and thus eligible for attorneys' fees under 42 U.S.C. § 1988. We begin with the American Rule that declares no attorneys'

fees are recoverable absent express statutory authority for such an award. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561-62 (1986). Unless Congress empowers it, a federal court has no authority to award attorneys' fees to prevailing parties. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975). Hence, our task is to determine whether Congress in enacting § 1988 contemplated an award of attorneys' fees in the present circumstances.

We turn to that statute, which states in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (Act). Section 1988 is analyzed in the same manner as other similarly worded fee-shifting statutes. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) (substantially similar language found in 42 U.S.C. 2000e-5(k), 42 U.S.C. § 2000a-3(b), and 42 U.S.C. § 1988 "is 'a strong indication' that they are to be interpreted alike"). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93 (1989). Parties have "prevailed" for purposes of shifting attorneys' fees "'if they succeed on any significant issue in litigation which

achieves some of the benefit the parties sought in bringing the action.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

Although the statute expressly conditions the award of attorneys' fees upon the discretion of the court, the effect of this language has been interpreted to create a strong preference in favor of the prevailing party's right to fee shifting. Therefore, "[a] party seeking to enforce the rights protected by the statutes covered by [§ 1988], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912 (Senate Report) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). This same section of the legislative history of § 1988 specifically contemplates that an intervenor may be a prevailing party. "In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors." *Id.* at 4 n.4, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5912 n.4.

The fact that a claim has been resolved by settlement, as in this case, does not preclude a finding that intervenors are prevailing parties; it is plain that a party may prevail when it vindicates rights -- regardless of whether there is a formal judgment -- through a settlement or consent judgment. *See, e.g., Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Koster v. Perales*, 903 F.2d 131, 134 (2d Cir. 1990); Senate Report at 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5912.

Actions alleging civil rights violations traditionally seek injunctive relief directly affecting not only the plaintiffs, but also certain non-participants and less directly the public at large. In addition to permitting non-participants to protect their implicated interests, intervention furthers the goals of efficiency and uniformity. To forbid the shifting of attorneys' fees to intervenors, who could otherwise bring a separate action later as plaintiffs alleging the same civil rights violations -- even, as in this case, those that persist after entry of a proposed consent settlement -- defeats the goal of judicial economy. Hence, there is no reason why the present intervenors, whether they be styled intervenor-plaintiffs or intervenor-defendants, may not be prevailing parties for purposes of § 1988.

B. Present Intervenors are Prevailing Parties

The next question to be addressed is whether the present agency intervenors are such prevailing parties. In awarding attorneys' fees, the district court found that as a result of intervenors' efforts the settlement was modified in ways that directly benefitted the children in the child care system, and it concluded that a material alteration of the legal relationship of the parties in a manner that Congress sought to promote in § 1988 had therefore been effected. 725 F. Supp. at 1332.

Appellant City does not dispute the fact that appellees' input was helpful to children in the child care system, but it contends that contributions to a settlement, no matter how important or helpful, do not entitle these intervenors to attorneys' fees. Something more is needed, the City insists, before an award may be made under § 1988, that is, the party seeking an award must assert a violation of its *own* rights under the applicable

civil rights statutes. Because intervenors asserted no such right, the City concludes, they may not be considered prevailing parties. Careful analysis of the statute's language, rules, legislative history and decisional law construing § 1988 does not support the City's view of the statute.

We begin by reviewing the language of that statute, *United States v. James*, 478 U.S. 597, 604 (1986), and assume the ordinary meaning of the language used expresses Congress' purpose. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Section 1988 expressly permits fees to be shifted to parties who prevail in certain enumerated civil rights actions. A limitation that only parties who prevail in vindicating their own civil rights may be awarded attorneys' fees is not found in the Act and such a reading of § 1988 does not comport with its plain and ordinary meaning.

At the same time we recognize that there are limitations on who may intervene in a civil rights suit. Either the applicant must have an interest implicated by the underlying suit that might be impaired, one which is not adequately represented by the original parties to the action, Fed. R. Civ. P. Rule 24(a)(2), or its "claim or defense and the main action [must] have a question of law or fact in common." Fed. R. Civ. P. Rule 24(b)(2). Rule 24 does not permit just any interested person to intervene and become a party to a suit. Since § 1988 extends fees only to prevailing *parties* in the action or proceeding, *see Morales v. Turman*, 820 F.2d 728, 732 (5th Cir. 1987) (*amicus curiae*, without intervention or standing, never participated as "party" in proceeding and is not entitled to fees despite providing beneficial input to remedy), ruling that present intervenors are prevailing parties will not open the flood-gates to *amicus curiae*, good samaritans, or even litigious meddlers so that they

may "team up" and overburden the nonprevailing party with excessive attorneys' fees. Rule 24 permits intervention in a civil rights action therefore not only to parties alleging violations of their own civil rights, but also to intervening parties alleging violations of the civil rights of individuals to whom they owe some duty or have a legal obligation to protect.

Considering next the legislative history, it may arguably be asserted from certain references that fee shifting is intended for the victims who vindicate their own civil rights. *See, e.g.*, Senate Report at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910 ("If private citizens are to be able to assert *their* civil rights . . . then citizens must have the opportunity to recover what it costs *them* to vindicate these rights in court") (emphasis added); H.R. Rep. No. 1588, 94th Cong., 2d Sess. 1 (1976) (act designed to grant effective access to courts for the majority of *victims* of civil rights violations who are unable financially to vindicate *their* rights).

Yet, it would be relying on a very slim reed indeed were we to limit the plain text of a statute because of two references found in its legislative history. Neither reference purports to limit the scope of the Act's effect, and each uses only general wording that applies to fee-shifting in the typical case. The omission of a reference in that history to the rights of third parties, those permitted to assert the rights of others through the law of *jus tertii*, or associational standing, is not dispositive; and, to place significance on it reads the cited legislative reports out of context. The legislative history does not express an intent so clearly contrary to the statute that it can support a conclusion more limited than the ordinary meaning of the statutory language used, one, moreover, in conflict with the broad remedial purpose of § 1988. *See Con-*

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

Instead, Congress aimed under the Act "to use the broadest and most effective remedies" to ensure that the objectives of the civil rights laws are attained. *See* Senate Report at 3, *reprinted in* U.S. Code Cong. & Admin. News at 5910. One way to accomplish that purpose is to promote the private enforcement of civil rights by encouraging litigants to act as "private attorneys general." The legislature recognized that inadequate resources of the enforcement division of the executive branch prevented it from eradicating all civil rights abuses solely through the government's efforts. Shifting attorneys' fees enabled Congress to promote vigorous enforcement of its civil rights policies, while limiting the growth of the bureaucracy charged with its administration. Again, Congress was aware that victims of civil rights violations usually are not wealthy people and "*[t]he organizations who have helped them* bring their cases are frequently not well financed." *Donnell v. United States*, 682 F.2d 240, 246 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983) (quoting 122 Cong. Rec. 35127 (October 1, 1976) (remarks of Rep. Holtzman)) (emphasis added). In fact, the Senate Report in its entirety stands as a singularly lucid pronouncement that the award of attorneys' fees made under § 1988 should be interpreted broadly so as to avoid frustrating enforcement of fundamental laws.

Thus, intervenors may act effectively as private attorneys general in vindicating abuses of civil rights, and where they have "contributed importantly to the creation of remedies," we and other courts have held they are entitled to an award of attorneys' fees. *See United States v. Board of Educ. of Waterbury*, 605 F.2d 573, 576 (2d Cir. 1979). *See also Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1535 (9th Cir.), *cert. denied*, 474 U.S. 826

(1985) ("[a]wards to intervenors should not be granted unless the intervenor plays a significant role in the litigation"); *Miller v. Statts*, 706 F.2d 336, 340-42 (D.C. Cir. 1983) (intervenors who allege a colorable civil rights claim may be entitled to attorneys' fees); *Donnell*, 682 F.2d at 247 (fees may be awarded to intervenors in a successful suit if they played a significant role in producing the outcome).

Waterbury presents analogous facts instructive on the resolution of the present case. There the intervenor was not the school children whose civil rights were implicated in the underlying school desegregation case, but was an organization consisting of Hispanic community leaders, individuals, and parents of some of the students. *Waterbury*, 605 F.2d at 574. In the foster care context presented here, the intervenor child care agencies have similar *in loco parentis* duties running to the children in their care, *see* New York Soc. Serv. Law § 383-384 (McKinney 1983 & Supp. 1991); *cf.* 42 U.S.C. § 675(5)(A) (1988). In both cases, the intervenor group's constituency included the plaintiff class of children asserting a civil rights interest.

For many would be intervenors, the availability of such a remedy would be a hollow one were the recovery of attorneys' fees not to exist as an incentive. *See* Senate Report at 3, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910; Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation*, 19 Harv. C.R.-C.L. L. Rev. 109, 118-20 (1984). Although capable of acting as effective private attorneys general, many potential parties would never intervene in civil rights actions because they, and the constituencies the represent, are economically disadvantaged. *See* Tamanaha, *supra*, at 143-44 n.130. In addition to duplicating effectively the limitations on joining actions

imposed by Rule 24, a narrow interpretation of § 1988 thwarts the fashioning of appropriate injunctive relief. Without the valuable perspective of those who might properly intervene -- but for their financial inability -- a reconciliation of the diverse community interests of those affected is frustrated. *See Waterbury*, 605 F.2d at 576.

Consequently, because implicated interests or common legal or factual questions involved violations of civil rights protected by the Constitution or federal statutes enumerated under § 1988, and because the efforts of the intervenors contributed importantly to the creation of remedies Congress sought to advance in the fee statute, the present intervenors properly were held to be prevailing parties entitled to an award of attorneys' fees.

C. Computation of Intervenors' Attorneys' Fees Award

How to disentangle the numerous objections to the settlement and decide which are subject to an award and which are not is the remaining question. Rule 24, as earlier noted, requires that a minimum nexus or connection be present between the intervening party whose interests are implicated and the original parties to the action. Given that the relationship between the intervenors in this case and the children entrusted in their care provided a sufficient nexus, our inquiry turns to whether intervenors' efforts effected the requisite "material alteration" as envisioned by Congress in § 1988, *see Texas State Teachers Ass'n*, 489 U.S. at 793, that is, whether intervenors' "participation contributed importantly to the creation of remedies." *Waterbury*, 605 F.2d at 576.

In answering that inquiry the following discussion should be helpful. First, efforts by counsel for intervenors that merely duplicate those of the plaintiffs in

effectuating the foster care children's civil rights should not result in an award of attorneys' fees. *See Grove*, 753 F.2d at 1535; *Donnell*, 682 F.2d at 247-48 (where "the intervenor contributed little or nothing of substance in producing the outcome, then fees should not be awarded"). *See also Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). The plaintiffs in a civil rights action have the priority claim for an award of fees as prevailing parties where their efforts have effectuated some or all of the civil rights involved in the litigation. The policies underlying private attorneys general and intervention are not so compelling when a suit has already been initiated and the potential intervenor's interests are adequately represented. Otherwise there would be a temptation to load up unnecessarily on intervenors in civil rights actions to compel defendants to settle because of the potential exposure to large legal fees.

The legal efforts of a plaintiff, on the other hand, may be legally deficient in a particular case or, at least, on some issues in the case. Hence, second, when non-duplicative efforts by intervenors effectuate the civil rights at issue they are entitled to an award because such a result furthers the purpose of the civil rights statutes in a fashion envisioned by Congress. For instance, where intervenors prevail in demonstrating that constitutional infirmities persisted under a proposed stipulation agreed to by plaintiffs, as occurred in the present case, their efforts probably would not be considered duplicative. Whether there was duplication of effort, nevertheless, is a question to be resolved by the district court.

Third, it follows that parties whose intervention produces results that are unrelated to remedying violations of civil rights are not eligible for attorneys' fees.

Section 1988 is expressly limited to suits to enforce specified civil rights provisions. Section 1988 therefore would not apply to an intervenor who prevails upon a non-civil rights claim because no "material alteration of the legal relationship ... *in a manner which Congress sought to promote*" has been achieved. *Texas State Teachers Ass'n*, 489 U.S. at 793 (emphasis added).

We recognize there will be situations where efforts expended on separate issues likely will be difficult to sort out. Questions of duplication and mixed motives are further clouded when litigation is resolved through settlement, when intervening parties object to a proposed settlement agreed to by the original plaintiffs, and still further in a case such as the instant one where all the parties claim to be acting in the foster children's best interests. Courts nevertheless must take care not to shift attorneys' fees in a manner Congress did not envision. In *Waterbury*, we noted that complex civil rights cases require a court to be flexible when using its discretion in awarding attorneys' fees to ensure that Congress' aim in enacting these statutes is realized. *Waterbury*, 605 F.2d at 576.

As a consequence, we hold finally that where a party has mixed motives for intervening, each of which are permissible grounds for intervening, and the intervening party prevails, the non-duplicative attorneys' fees attributable to the efforts expended in pursuit of civil rights remedies may be recovered. And, where the efforts that furthered civil rights objectives concomitantly advanced non-civil rights concerns, for example, administrative and clinical concerns, attorneys' fees may also be awarded. Any adjustment in the fee award based upon the extent to which a party's participation contributed to the ultimate remedy, including considerations of

duplication and motivations other than civil rights, rests appropriately in the district court's sound discretion.

CONCLUSION

The district court awarded attorneys' fees to intervenors because the 19 nondefendant child care agencies prevailed on civil rights claims as well as clinical and administrative objections to the proposed stipulation. It did not discuss to what degree the work of intervenors' counsel may have been duplicative with that expended by plaintiffs' counsel, or what portion of that work can be attributed solely to advancing concerns other than civil rights violations. For these determinations, and any corresponding changes in the fee award they might merit, we remand the instant matter to the district court for further proceedings in accordance with this opinion.

Decision and Judgment of the United States Court of Appeals for the Second Circuit, Dated September 4, 1991

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 896 -- August Term 1990

(Argued January 17, 1991 Decided September 24, 1991)

Docket No. 90-7698

SHIRLEY WILDER; THOMAS EDWARDS, and SHARON RODWELL; BARRY PARKER; by his mother and next friend, MADELINE BUTLER; ROBIN HERBERT, by her mother and next friend; NANCY HERBERT; SHEDRICK ROBERTS, by his mother and next friend; ANNIE ROBERT; CHRISTOPHER TORIAN, by his mother and next friend; LILLIAN TORIAN, on their own behalf and on behalf of all others similarly situated; DR. KENNETH CLARK, REV. HOWARD MOODY, DR. RICHARD CLOWARD, MILDRED DAVIS,

Plaintiffs,

- v. -

BLANCHE BERNSTEIN, individually and as Administrator of the; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; THE CITY OF NEW YORK; THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; BARBARA BLUM, individually and as commissioner of the; NEW YORK STATE DEPARTMENT OF

SOCIAL SERVICES; BEVERLY SANDERS, individually and as Administrator of; SPECIAL SERVICES FOR CHILDREN; CAROL PARRY; ELIZABETH BEINE; LINDA MARINO, individually and as Director of the Office of Allocations and Accountability of Special services for Children, ARTHUR LEVITT, as comptroller of the State of New York; HARRISON J. GOLDIN; as Comptroller of the City of New York, PAULA RABINOW, individually and as Director of the Joint Planning Service; SANDRA HOWARD, individually and as Supervisor of the Central referral unit; SISTER MARY FRANCENE, individually and as Administrator of the Angel Guardian Home; SISTER SHEILA, individually and as Executive Administrator of Astor Home for children; FRED APERS, individually and as Executive Director of Cardinal Hayes Home for Children; JOHN DEMARTINO, individually and as Executive Director of Cardinal McCloskey school and home for children; JAMES P. O'NEILL, individually and as executive director of catholic guardian society; CATHERINE WHITE, individually and as director of catholic guardian society of the diocese of Brooklyn; SISTER UNA MCCORMACK, individually and as executive director of catholic home bureau for dependent children; DR. JEROME GOLDSMITH, individually and as executive director president of Jewish Board of Guardians; ABE LAVINE, individually and as executive vice president of Jewish Child care; ASSOCIATION OF NY; JACOB TROBE; BROTHER BRENDAN BREEN, individually and as administrator of Lincoln Hall; BROTHER CHRISTOPHER FOLEY; RALPH CHILLION, individually and as Director of Little Flower Children's services; SISTER ROSALIE

MCNAUGHTON, individually and as executive director of McMahon services for children; SISTER MARY JAMES, individually and as administrator of Madonna Heights School for Girls; KENNETH A. MILLER, individually and as director of Maimonides Residential Centers; ISAAC MAIZES; SISTER MARY CHRYSOSTOM, individually and as administrator of Mercy Home for Children; BATHSHEVA MANDEL, individually and as director of Mishkon B'Nai Y'Israel; MONSIGNOR EDMUND F. FOGARTHY, individually and as Executive director of Mission of the Immaculate Virgin; SISTER MARIAN CECILIA SCHNEIDER, individually and as Executive Director of the New York Foundling Hospital; LESTER KAUFMAN, Individually and as Executive Director of Ohel Children's Home; HUGH WALLACE, individually and as Residence Director of Pius XII school; BROTHER ROBERT FONTAINE; DENIE BARRY, individually and as Executive Director of St. Agatha Home for Children; ROSEMARY A. SHERIDAN, individually and as executive director of St. Cabrini Home Inc.; ROBERT J. MCMAHON, individually and as Executive Director of St. Christopher's Home; SISTER MARY PATRICK, individually and as executive director of St. Dominic's Home; SISTER MARY SHEILA, individually and as director of St. Germaine's Home; BROTHER THOMAS TRAGER, individually and as Executive director of St. John's Residence and school for boys; SISTER RITA MEANEY, individually and as administrator of St. Joseph's Children services; SISTER MARITA PAUL, individually and as executive director of St. Joseph's home of Peekskill; SISTER MARY OLIVA, individually and as administrator of St. Mary's

of the angels home; EMANUEL J. STARACE, individually and as executive director of St. Michael's Home; SISTER DELLA MAE QUINN, R.S.M.; REV. ROBERT M. HARRIS, individually and as administrator of St. Vincent's Hall; JOSEPH ALTHEIMER, individually and as administrator of sister of the good shepherd residences,

Defendants-Appellants,

ABBOTT HOUSE, BERKSHIRE FARM CENTER & SERVICES FOR CHILDREN, BROOKLYN HOME FOR CHILDREN, BROOKWOOD CHILD CARE, EPISCOPAL MISSION SOCIETY, GREEN CHIMNEYS CHILDREN'S SERVICE, HEARTSEASE HOME, INC., INWOOD HOUSE, LAKESIDE SCHOOL, LOUISE WISE SERVICES, LUTHERAN COMMUNITY SERVICES, PUERTO RICAN FAMILY ASSOCIATION, ST. CHRISTOPHER-JENNIE CLARKSON CHILD CARE SERVICES, SHELTERING ARMS CHILDRENS SERVICE, SOCIETY FOR SEAMAN'S CHILDREN, SPENCE-CHAPIN SERVICES TO CHILDREN, TALBOT PERKINS CHILDREN'S SERVICES, THE CHILDREN'S AID SOCIETY, and THE CHILDREN'S VILLAGE,

Intervenors-Appellees.

Before: OAKES, *Chief Judge*,
CARDAMONE and WALKER, *Circuit Judges*

The City of New York appeals from an order of the United States District Court for the Southern District of New York (Ward, J.) entered June 29, 1990, awarding

attorneys' fees to a group of intervenors under 42 U.S.C. § 1988.

Reversed.

Judge Oakes dissents in a separate opinion.

ELIZABETH DVORKIN, New York, New York (Victor A. Kovner,

Corporation Counsel of the City of New York, Stephen J. McGrath, Francis F. Caputo, New York, New York, of counsel), *for Defendants-Appellants*.

DONALD J. COHN, New York, New York; (Bruce Topman, Webster & Sheffield, New York, New York; Stephen Wise Tulin, Polier, Tulin, Clark & Zalk, New York, New York, of counsel), *for Intervenors-Appellees*.

CARDAMONE, *Circuit Judge*:

We again visit the controversy regarding New York City's scheme for providing child care services to foster children who require placement in institutions and foster homes. Before us is an appeal by the City of New York (City or appellant) from a June 29, 1990 order of the United States District Court for the Southern District of New York (Ward, J.). awarding $355,388.85 in attorney's fees to appellees-intervenors, a group of 19 private child care agencies.[1]

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[1] The intervenors group consists of the following agencies: Abbott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, The Children's Aid Society, The Children's Village, Episcopal Mission Society, Green Chimneys Children's Service, Heartsease Home, Inc., Inwood House, Lakeside School, Louise Wise Services, Lutheran Community Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seamen's Children, Spence-Chapin Service to Children, and Talbot Perkins Children's Services.

We are asked to determine whether an intervenor group, which contributed importantly to the formation of the settlement we approved in *Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988), is entitled to an award of attorney's fees under 42 U.S.C. § 1988 (1988). In making that determination we can see Congress planned that individuals asserting their civil rights should be able to recover what it cost them to vindicate these rights, and that awarding attorney's fees to such individuals implemented this design. Where Congress looks to one thing as a solution to a problem, courts should not look to another thing, and thereby alter Congress' plan by broadening the definition of those entitled to such fees. Because we think that is what the district court did in this case, we reverse.

BACKGROUND

The facts are set forth in Judge Ward's thorough opinion reported at 725 F. Supp. 1324 (S.D.N.Y 1989), with which we assume the reader's familiarity, as well as in his opinion approving the settlement of the underlying lawsuit, reported at 645 F. Supp. 1292 (S.D.N.Y. 1986). We recount only those facts relevant to this appeal.

The underlying litigation commenced in 1973 when New York City's child care placement system was challenged by a group of plaintiffs representing a class of Protestant Black children. Plaintiffs ultimately asserted in their complaint four grounds on which they attacked the City's foster care system: (1) the child care system operated to discriminate against children based on race, (2) it discriminated on the basis of religion, (3) it amounted to an establishment of religion, and (4) it unduly burdened the free exercise rights of Protestant children, who were not Catholic or Jewish. The complaint sought declaratory and injunctive relief under 42

U.S.C. § 1983, 1985, and 1986, and 28 U.S.C. § 2201 and 2202. The matters alleged in the complaint were claimed to violate the First and Fourteenth Amendments, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200d (1982), and New York anti-discrimination regulations, 18 N.Y.C.R.R. §§ 303.1, 303.2 (1978).

In this complex litigation many groups became involved to varying degrees and for varying reasons. The main participants were (1) plaintiffs, a group of Protestant Black children, who were neither Catholic nor Jewish, in need of care outside their homes; (2) defendants New York City and municipal officials responsible for the City's child care system; (3) defendants administrators of private, religiously affiliated, either Jewish or Catholic, child care agencies (defendant agencies); and (4) intervenors.

In the summer of 1983, shortly before trial was scheduled to begin, plaintiffs and the City began negotiations in an attempt to reach a settlement. At that time intervenors had in their care 4,600 children constituting 25 percent of the 17,000 children then in the City's foster care system. Most of those in intervenors' care were Black Protestant children and belonged therefore to the plaintiff class. In January 1984 some of the eventual intervenors wrote to the Corporation Counsel of New York City expressing strong objections to drafts of the settlement negotiated by it and plaintiffs. In April of that year plaintiffs and the City presented a proposed stipulation of settlement to the district court. The settlement ignored comments and suggestions made by the intervenor agencies, and was objected to by the defendant agencies and by intervenors. Intervenors continued to press their objections and, on June 15, 1984, were granted leave to intervene "for the limited purpose of opposing the proposed settlement."

Appellees presented comprehensive criticisms of the proposed settlement supported by affidavits from child care professionals. The objections were addressed to the administrative unworkability of the settlement, its failure to consider adequately the needs of the children served, and its discrimination on religious grounds. Negotiations, in which intervenors then participated, continued through the summer. In August basic agreement on general topics was reached. The parties continued to negotiate, this time in open court, and in January 1985 a stipulation of settlement was submitted. On October 8, 1986, over the objections of the defendant agencies, the district court approved the stipulation of settlement. On appeal, we affirmed the settlement. 848 F.2d 1338.

On March 17, 1989 intervenors moved for attorney's fees under § 1988. Specifically, they sought from the City fees of $416,052.50, enhanced by a factor of 1.75 for a total of $775,303.50, disbursements of $17,020.59, and continuing City liability for fees related to enforcement of the decree. The City opposed the application, asserting that intervenors were not a prevailing party because they had no federal constitutional or statutory rights within the meaning of 42 U.S.C. § 1988 (1988) at stake in the litigation. The City had already paid plaintiffs $1,775,000 in attorney's fees and costs pursuant to an offer of judgment submitted by the City in late June 1989, which was accepted by plaintiffs shortly thereafter.

In its opinion approving the stipulation of settlement and in its opinion awarding attorney's fees to intervenors, the district court detailed intervenors' extensive contributions in reaching the settlement finally accepted by all participants, except the defendant agencies. Because they had "no axes to grind," the district

court stated, intervenors were able to measure the proposals according to the best interests of the children and provide it with valuable insights into the clinical and administrative realities of child care. The stipulation of settlement finally adopted, while adhering to the general outline of the original stipulation, was influenced by the concerns aired by intervenors.

The court found intervenors' efforts were essential to the creation of a workable remedy that vindicated the civil rights of the children and their families in the foster care system, and held that the intervenors were therefore prevailing parties entitled to an award of attorney's fees and costs. It did not accept appellees' computation of fees, denied their request for an enhancement factor, and awarded fees in the amount of $355,388.85 and disbursements of $10,212.35. The City of New York has appealed.

DISCUSSION

The City challenges the district court's conclusion that intervenors were a prevailing party and thus eligible for attorney's fees under 42 U.S.C. § 1988 (1988). We begin with the American Rule that declares no attorney's fees are recoverable absent express statutory authority for an award. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 561-62 (1986). Unless Congress empowers it, a federal court has no authority to award attorney's fees to prevailing parties. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975). Hence, our task is to determine whether Congress in enacting § 1988 contemplated an award of attorney's fees in the present circumstances.

We turn to that statute, which states in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1988). Section 1988 is analyzed in the same manner as other similarly worded fee-shifting statutes. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-093 (1989).

There is no question that the legislative history of § 1988 contemplates that an intervenor may be a prevailing party. S. Rep. No. 1011, 94th Cong., 2d Sess. 4 n.4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912 n.4 (Senate Report) ("In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors."). Nor does the fact that a claim has been resolved by settlement, as in this case, preclude an award of attorney's fees to the prevailing party; it is plain that a party may prevail when it vindicates rights -- regardless of whether there is a formal judgment -- through a settlement or consent judgment. *See Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Koster v. Perales*, 903 F.2d 131, 134 (2d Cir. 1990); Senate Report at 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5912. In awarding attorney's fees in the instant case,

the district court found that as a result of intervenors' efforts the settlement was modified in ways that directly benefitted the children in the child care system, and it concluded that a material alteration of the legal relationship of the parties in a manner that Congress sought to promote in § 1988 had therefore been effected. 725 F. Supp. at 1332.

Appellant City does not dispute the fact that appellees' input was helpful to children in the child care system, but it contends that contributions to a settlement, no matter how important or helpful, do not entitle these intervenors to attorney's fees. Something more is needed before a court may take an award under § 1988, that is, the party seeking an award must assert a violation of its *own* rights under the applicable civil rights statutes. The City insists intervenors have asserted no such right and therefore may not be considered prevailing parties. We agree.

In *United States v. Bd. of Educ. of Waterbury*, 605 F.2d 573 (2d Cir. 1979), we held intervenors may be awarded attorney's fees if they "contributed importantly to the creation of remedies." *Id.* at 576; *see also Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1535 (9th Cir. 1985) ("[a]wards to intervenors should not be granted unless the intervenor plays a significant role in the litigation"); *cf. Donnell v. United States*, 682 F.2d 240, 247 (D.C. Cir. 1982) (fees should not be awarded to intervenors in a successful suit if they played an insignificant role in producing the outcome).

Yet, in *Waterbury*, we did not specifically address the question of whether an intervenor, in order to be entitled to attorney's fees as a prevailing party, must also assert an interest protected by the civil rights statutes. An examination of the factual background in *Waterbury*

reveals that many members of the intervenor group's constituency in that case asserted such a civil rights interest. *See* 605 F.2d at 574 (an organization consisting of Puerto Rican parents, community leaders, and individuals, was permitted to intervene in an action seeking to desegregate schools in order to protect the right of Waterbury's Hispanic students to attend integrated schools and to be free from disproportionately bearing the burden of the desegregation); *see also Donnell*, 682 F.2d at 244 (seven black voters intervening on the side of the United States in an action brought by the Board of Supervisors of Warren County, Mississippi, seeking a declaratory judgment that a plan to establish voting districts did not have a racially discriminatory purpose or effect were found to be prevailing parties.) Thus, *Waterbury* does not bear the weight placed on it by the district court because the intervenors there were seeking to vindicate their own civil rights, not the rights of others.

Legislative history supports the view that though intervenors may be prevailing parties, it is only when they assert their own civil rights that they are so considered. Congress planned on having § 1988 serve as a mechanism for vindicating the rights of those whose civil rights had been violated, not for forwarding civil rights in general. For example, the House Report states:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [§ 1988] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

H.R. Rep. No. 1588, 94th Cong., 2d Sess. 1 (1976). The Senate Report contains language that even more strongly suggests that attorney's fees were to be those paid to the *victims* of constitutional injury, not simply a party that aids in upholding the rights of those victims. Senate Report at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910 ("If private citizens are to be able to assert *their* civil rights . . . then citizens must have the opportunity to recover what it costs *them* to vindicate these rights in court") (emphasis added).

Because § 1988 is an exception carved out of the American Rule by Congress, we must take care not to award attorney's fees that the legislative branch has not authorized. The choice as to whether fees are available and under what circumstances is a function that Congress has reserved to itself. *Russo v. New York*, 672 F.2d 1014, 1023 (2d Cir. 1982), *modified on other grounds*, 721 F.2d 410. Before awarding fees it is necessary for a court to find therefore some specific congressional plan that provides that an intervenor, not asserting its own civil rights, was an intended beneficiary of § 1988. Neither the House nor the Senate Reports just cited contain any notion that Congress anticipated that such parties would be the beneficiaries of this legislation. Thus, it seems inescapable that Congress did not contemplate awards of attorney's fees under § 1988 to persons other than to those whose civil rights have been violated.

Here no member of the intervenor group has asserted any civil rights interests of its own. Instead, intervenors became involved initially in the instant litigation because of their fear both that administrative burdens imposed by the original proposed settlement would make the foster care system even more unworkable than the record shows it presently is, and also give rise to those clinical concerns that the list of intervenors'

objections in the trial court reveals, *see* 645 F. Supp. at 1346-47. On that score alone intervenors would doubtless have entered the settlement negotiations regardless of whether attorney's fees were available. Further, intervenors cannot be said to be the legal custodians or guardians of the children in their care. That responsibility belongs to the appropriate City agency. *See* N.Y. Soc. Serv. Law § 383(2) (McKinney 1983 & Supp. 1991). Thus, it does not appear that intervenors are possessed of any interest that permits them to assert the civil rights of the foster children in their care and to be considered a prevailing party under § 1988.

Finally, we agree with the district court that appellees' efforts were beneficial to the children whose rights were at stake, but the City's earlier nearly two million dollar payment for plaintiffs' attorney's fees was for services that also vindicated the constitutional rights of Protestant Black children, the same constituency intervenors seek to be rewarded for representing. Congress and not the courts determines whether a party may be awarded attorney's fees. *See Alyeska Pipeline Serv. Co.*, 421 U.S. at 269. And, since the intervenors before us are not one of those parties, the district court's award of attorney's fees to them must be reversed.

CONCLUSION

The judgment of the district court is reversed. Intervenors' request for attorney's fees on appeal is denied. Each party shall bear its own costs.

OAKES, *Chief Judge*, dissenting:

I dissent essentially for the reasons stated by Judge Ward, *Wilder v. Bernstein*, 725 F. Supp. 1324 (S.D.N.Y. 1989), and because I think that the distinction drawn by the panel majority between this case and *United States v. Board of Education of Waterbury, Connecticut*, 605 F.2d

573 (2d Cir. 1979), where we awarded intervenors their attorneys' fees, is a distinction without a difference. The panel majority's narrow and formalistic reading of the term "prevailing party" takes us down the same road as *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) -- road rejected by Congress' enactment of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988).

In contrast to the panel majority, I find no basis for the argument that Congress intended to limit attorney's fees to those intervenors who sought to vindicate their "own" civil rights claims. And even if the legislative history were to reveal reeds from which a court might weave such an interpretation, the final production would run contrary to the underlying purpose of section 1988. Complex litigation, such as the case at hand, requires that the allocation of attorneys' fees be approached with flexibility, if we are to adhere to Congress' goal of providing incentives to those who act as private attorneys general to aid in the eradication of civil rights violations. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5909-5911; *Waterbury*, 605 F.2d at 576. To shift the focus of section 1988, as the panel majority does, from crafting an equitable remedy to the delineation of which rights belong to whom, distracts us from the goal Congress has set before us. As we said in *Waterbury*, "The precise remedy does not follow logically from the determination of liability, but rather reflects a careful reconciliation of the interests of the many affected members of the community and a choice among a wide range of possibilities." 605 F.2d at 576. Thus, unlike the panel majority, I cannot simply allude to Judge Ward's opinion and assume familiarity with it because doing so tends to underemphasize the essential findings in the case. Rather, I think

it important to state precisely who the intervenors are, what they did, and why Judge Ward concluded that he was bound to award them attorneys' fees by our *Waterbury* decision.

This complaint challenged the entire city's child care system on the basis that it: (1) operated to discriminate against children based on race and religion; (2) amounted to the establishment of religion; and, (3) unduly burdened the free exercise rights of Protestant children, as well as (4) denied black Protestant children equal access to child care services. *Wilder*, 725 F. Supp. at 1327. The intervenors are a group of nineteen private child care agencies which were properly permitted to intervene in this action; they represent a broad spectrum of foster care clinicians and administrators who together care for approximately 4600 children. *Id.* at 1327 & n.3 In the sixteen years of litigation involved in this case up to Judge Ward's decision in the district court, the intervenors did the following:

1. They strongly objected to the draft Stipulation of Settlement on the part of the plaintiff class and the city defendants on the basis not just that the proposed settlement was administratively unworkable but that it failed to protect the best interests of the children and unconstitutionally discriminated against children whose parents exercised a religious preference in child care. *Id.* at 1328.

2. The objections the intervenors presented were "comprehensive" and supported by detailed affidavits providing "important background and insight." *Id.*

3. The intervenors "played an integral role" concerning the content of the proposed Stipulation, and "sparked primarily" by their criticisms and suggestions,

the parties resolved the numerous legal and child care issues involved. *Id.*

4. The final version of the Stipulation of Settlement, as supported by the intervenors, was ultimately approved by the court in *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). In the district court's decision approving the settlement, the court noted that the intervenor's "direct participation in the New York City foster care system, and their ongoing contact with the children in care, give them the ability and incentive to comment authoritatively on the likely impact of the settlement on agency administrators and clinicians and on the children they serve." *Wilder*, 645 F. Supp. at 1350. In Judge Ward's later decision awarding the intervenor's attorneys' fees, presently on appeal, he said that "[t]he intervenors worked to promote a more viable solution to the problems presented by the foster care system in New York, while at the same time assuring that the best interests of all children in the system were taken into account .... they played an essential role in forging the final version of the Stipulation which was acceptable to all the parties except the sectarian agencies ...." *Wilder*, 725 F. Supp. at 1329.

The above being true, it seems to me that this case fits squarely within our *Waterbury* case where we said that "[a]n intervenor is certainly a *party*," 605 F.2d at 576,[1] and that even though a consent decree was involved the intervenors could be considered a prevailing party because they succeeded in opposing a plan "which unfairly

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[1] This point has been referred to favorably by other courts. *E.g., Seattle School Dist. No. 1 v. State of Washington*, 633 F.2d 1338, 1349-50 (9th Cir. 1980).

[2] Although the fee-shifting statute in Waterbury was not 42 U.S.C. § 1988 but, rather, section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (repealed 1979), the pertinent language in

(Footnote Continued)

burdened their constituency." *Id.* at 577.[2] As the remedy ultimately adopted in *Waterbury* , a school desegregation case, "bore a substantial resemblance to the plan intervenors supported (indeed, it took the same general approach)," the court concluded that the intervenors "c[a]me within the meaning of the term 'prevailing party.'" *Id.* The *Waterbury* court, per Judge Mansfield, refused to interpret the term "prevailing party" in a fashion that would "severely limit the availability of attorneys' fees to parties whose participation contributed importantly to the creation of remedies in these cases." *Id.* at 576. This is exactly what the intervenors in this case did; in contributing importantly to the creation of the remedies approved by the district court and upheld in our court, they came within the meaning of the term "prevailing party."

The panel majority seeks to distinguish *Waterbury* by saying that there "many members of the intervenor group's constituency in that case asserted . . . a civil rights interest" and that "the intervenors there were seeking to vindicate their own civil rights, not the rights of others." Opinion, p. 9. So too, however, in this case the intervenor group's constituency included the plaintiff class of children asserting a civil rights interest. The intervenors in *Waterbury* were not themselves school children, though some of them were Hispanic. Here, too, in the foster care context, the intervenors were not children but were agencies -- clinicians and administrators who care for thousands of children. As such, the intervenors had duties running to the children that made them stand *in loco parentis*, duties that would be implied by law if they were not already set forth in the New York Statutes. N.Y.

(Footnote Continued)
the two statutes is "virtually identical." *Waterbury*, 605 F.2d at 576. There is therefore no reason not to apply the *Waterbury* court's analysis to a situation arising under section 1988.

Soc. Serv. Law §§ 383-384 (McKinney 1983 & Supp. 1991). This case cannot be distinguished from *Waterbury*.

Furthermore, *Waterbury* cannot be overruled *sub silentio* by a panel majority. Nor should it be overruled.[3] The quotations from the House and Senate Reports used to bolster the position that intervenors who do not assert their own civil rights are not entitled to attorneys' fees seem to me, with all due respect, to have no bearing whatsoever on the question at hand. These statements were not offered in the context of whether intervenors must be asserting their own civil rights but were stated in the much more general context of whether fees should be awarded to prevailing parties generally.

I agree, in short, with the commentator who said,

> It may be argued that th[e] requirement that parties must raise a civil rights claim to recover attorneys' fees should further be limited to situations where a party claims *its own* legal rights are violated, or will be violated by the defendant's acts or the plaintiff's proposed remedy. This limitation, however, seems unnecessary and even counter-productive. First, it has been argued here that certain intervenors should be encouraged to join civil rights actions. Second, the concerns that this limitation evince are already protected by the rules which allow

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[3] Waterbury has been favorably treated in a number of other decisions and criticized in none. *E.g., Frazier v. Merit Systems Protection Bd.*, 672 F.2d 150, 168 (D.C. Cir. 1982); *Seattle School Dist. No. 1 v. State of Washington*, 633 F.2d 1338, 1349-50 (9th Cir. 1980). Commentators, as well, have noted the significance of *Waterbury*. *See Rhode, Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183, 1229 (1982).

> intervenors to join cases. If the suggested limitation were imposed, it would exclude some desirable parties and would duplicate, in effect, the rules limiting intervention. Not allowing fees to such parties would operate only against those financially unable to join a suit while the limits on intervention would operate equally on all parties.

Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation*, 19 Harv. C.R.-C.L. L. Rev. 109, 143 n.130 (1984) (emphasis added). But reading such a limitation into section 1988, as the majority panel does, has implications that go beyond inefficiency and inequity. By threatening to remove suits involving *jus tertii*, associational standing, and overbreadth from the purview of section 1988, this reading displays an insensitivity to the economic incentives Congress wished to foster and weakens the tools available to those who seek to eradicate civil rights violations. In addition, a narrow interpretation of section 1988 may have a ripple effect, weakening the more than 100 other fee-shifting statutes in the United States Code, which courts interpret by drawing upon the principles and case law of section 1988. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-60 (1986); Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291, 306 (1990).

There is no question that, by its terms, section 1988 only authorizes fee-shifting for those parties seeking to enforce civil rights. Indeed, the court below recognized this principle. *See Wilder*, 725 F. Supp. at 1331 ("It is clear that the purpose of the fee-shifting statute is to encourage the vindication of civil rights, and parties who

are not involved in furthering such purposes should not be entitled to benefit from the statute."). The only proper question, then, is whether intervenors sought to enforce civil rights. The district court found that they did:

> The intervenors did more than just advance their own self-interests. Their participation furthered the purposes of the civil rights statutes by facilitating the formation of a settlement which would safeguard the constitutional rights of the children in the City's care, while assuring that the child care system itself would remain focused on the overall best interests of the children entitled to the protection of the civil rights laws.
>
> Furthermore, the intervenors consistently and forcefully articulated objections addressed to the constitutional and civil rights issues in this litigation. Their efforts helped to vindicate the civil rights of the children and families in the foster care system which they served, not just their own self interests.

Id. at 1331-32. *See also Wilder*, 645 F. Supp. 1292, 1303-04, 1350 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). There is ample support for this finding in the record; therefore, we should affirm the district court decision.

I eschew the narrow construction of the term "prevailing party" the majority gives the congressional statute which, after all, in the words of the Senate Report, was "an appropriate response" to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912. Congress sought to

return to the teaching of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that a party who enforced a civil rights statute "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402; *see also* Note, *Promoting the Vindication of Civil Rights through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 353 (1980). The intervenors here were such a party. There is no way in which it can be suggested that to grant them attorneys' fees would be "unjust." There is every reason to follow our precedent -- the *Waterbury* case.

Decision and Judgment of the United States District Court for the Southern District of New York, Dated December 4, 1989

Shirley WILDER, *et al.*,

Plaintiffs

v.

Blanche BERNSTEIN, individually and as Administrator of the New York City Human Resources Administration, *et al.*,

Defendants,

and

Abbott House, et al.,

Intervenors.

No. 78 Civ. 957 (RJW).

United States District Court
S.D. New York.

Dec. 4, 1989.

Intervenors in civil rights action sought recovery of attorney fees. The District Court, Robert J. Ward, J., held that intervenors were prevailing parties entitled to recover attorney fees.

Ordered accordingly.

Polier, Tulin, Clark & Zalk (Stephen Wise Tulin, of counsel), Webster & Sheffield (Donald J. Cohn, Seth M. Lahn, Joseph M. Heppt, Sharon A. Lewis, of counsel), New York City, for intervenors.

Peter L. Zimroth, Corp. Counsel of the City of New York, Norma Kerlin, Asst. Corp. Counsel, New York City, for defendant New York City.

OPINION

ROBERT J. WARD, District Judge.

Once again the Court is asked to decide a controversy stemming from the litigation concerning the provision of child care services by New York City (the "City") to those children requiring placement in institutions and foster homes. The litigation, which at its core revolves around the best interests of the children in the City's child care system, has occupied the courts of this Circuit for the past sixteen years, generating four published opinions prior to this decision.[1] The main protagonists in this ongoing saga are (1) plaintiffs, who represent a class of black Protestant children in need of child care services out of their home, (2) the City and the municipal officials responsible for the City's child care system (collectively the "City defendants"), (3) a group of ninet- -n private child care agencies which intervened in this action (the "intervenors") and (4) a group of administrators of private, religiously affiliated, child care agencies (the

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[1] These decisions are: *Wilder v. Sugarman*, 385 F.Supp. 1013 (S.D.N.Y. 1974) (per curiam) (three-judge panel upheld facial constitutionality of New York State's constitutional and statutory provisions authorizing religious matching for publicly-funded foster care of children); *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980) (plaintiff class certification granted, remaining facial attacks on the validity of New York statutes dismissed); *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (approval of stipulation of settlement) (hereinafter "*Wilder III*"), *aff'd*, 848 F.2d 1338 (2d Cir. 1988) (approval of consent decree upheld on appeal taken by sectarian agencies) (hereinafter "*Wilder IV*").

The history of this litigation has been detailed in *Wilder III* and *Wilder IV*, familiarity with which is presumed, and the Court will not undertake an unnecessary repetition of this chronology.

"sectarian agencies"). This decision will revisit the history of this litigation in the context of the intervenors' motion for an award of attorneys' fees and costs against the City, pursuant to 42 U.S.C. § 1988. The City has cross-moved to dismiss the intervenors' application for fees.[2] For the reasons that follow, the intervenors' motion is granted and the City's cross-motion is denied.

BACKGROUND

Plaintiffs challenged the City's child care system on several constitutional grounds, their final complaint alleging, in essence, that the child care system (1) operated

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[2] A host of motions were initially filed with the Court regarding the entitlement of various parties to attorneys' fees. Plaintiffs filed motions for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 against the City defendants, the sectarian agencies, the intervenors and Lester Kaufman, individually, and as Executive Director of Ohel Children's Home ("Kaufman"). In response, the intervenors filed a motion for sanctions against plaintiffs, pursuant to Rule 11, Fed.R.Civ.P. The intervenors also filed their own motion for attorneys' fees and costs against the City. The City then cross-moved to dismiss the intervenors' application.

On or about June 26, 1989, the City defendants submitted an offer of judgment to plaintiffs, pursuant to Rule 68, Fed.R.Civ.P., in the amount of $1,775,000.00, covering all of plaintiffs' claims for attorneys' fees and costs, except those incurred in the appeals from this Court's decision approving the Stipulation. Plaintiffs accepted the offer of judgment on or about June 27, 1989. A conference was held before the Court on July 21, 1989 to discuss the remaining motions. Pursuant to stipulation, so ordered August 9, 1989, plaintiffs withdrew their motions for attorneys' fees and costs against the intervenors and the sectarian agencies, and the intervenors withdrew their Rule 11 motion against plaintiffs.

Plaintiffs' application for attorneys' fees against Kaufman was withdrawn with prejudice pursuant to stipulation filed in April 1989. A subsequent motion by plaintiffs for attorneys' fees and costs against Kaufman, pursuant to rule 37(b), was also withdrawn with prejudice by stipulation filed in June 1989. Only the intervenors' motion for fees and the City's cross-motion to dismiss remain.

to discriminate against children based on race and religion, (2) amounted to the establishment of religion and, (3) unduly burdened the free exercise rights of Protestant children. They also claimed that defendants had denied the plaintiff class equal access to child care services in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and applicable state law.

The intervenors represent a broad spectrum of foster care clinicians and administrators who together care for approximately 4,600 children.[3] A number of the intervenors were originally named as defendants in the *Wilder* litigation, but, by 1978, these defendants had all been dismissed from the case, many with prejudice.

Shortly before trial was to begin in August 1983, plaintiffs and the City defendants renewed their efforts at settlement. These negotiations proved fruitful and resulted in plaintiffs and the City defendants fashioning a draft stipulation of settlement. In or about January 1984, fourteen of the eventual intervenors, plus a number of other agencies, wrote the City expressing strong objections to the draft stipulation of settlement. The intervenors articulated their concerns with the draft stipulation to the Court and to the parties throughout the winter and early spring of 1984.

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[3] The nineteen not-for-profit child care agencies which comprise the intervenors are: Abott House, Berkshire Farm Center & Services for Children, Brooklyn Home for Children, Brookwood Child Care, The Children's Aid society, The Children's Village, Episcopal Mission Society, Green Chimneys Children's Service, Heartsease Home, Inwood House, Lakeside School, Louise Wise Services, Lutheran Community Services, Puerto Rican Family Association, St. Christopher-Jennie Clarkson Child Care Services, Sheltering Arms Children's Service, Society for Seamen's Children, Spence-Chapin Services to Children, and Talbot Perkins Children's Services.

In April 1984, plaintiffs and the City defendants presented a proposed stipulation of settlement to the Court for approval. The Court then directed that notice of the proposed settlement be given to members of the plaintiff class. The intervenors, whose concerns with the draft had not been addressed in the proposed stipulation, continued to press their objections. They maintained that the proposed stipulation was fundamentally flawed because, *inter alia*, (1) it failed to protect the best interest of the children, (2) it unconstitutionally discriminated against children whose parents exercised a religious preference in child care, and (3) it failed to take into account the complex problems presented by the placement of children and the practical limitations inherent in the child care system. The intervenors were granted leave to intervene to oppose the proposed stipulation by order of the Court filed June 15, 1984.

The objections the intervenors presented to the Court concerning the proposed stipulation were comprehensive, and were supported by detailed affidavits from child care professionals. The affidavits and supporting materials presented by the intervenors provided the Court and the parties with important background and insight on the clinical and administrative realities confronting the child care system. Negotiations concerning the content of the proposed stipulation, in which the intervenors played an integral role, continued throughout the summer. Beginning on August 6, 1984, the Court commenced a hearing on the fairness, reasonableness and adequacy of the settlement. As this Court noted in *Wilder III*, sparked primarily by the criticisms and suggestions of the intervenors, the parties embarked on a series of meetings in open court to attempt to resolve the numerous legal and child care issues involved with the proposed stipulation of settlement.

The intervenors reached agreement on certain general topics with plaintiffs and the City defendants, and suggested specific changes that could be made in the original settlement agreement to resolve or mitigate many of the remaining problems they had identified in their original objections. The parties continued to negotiate around the various concrete proposals offered by the intervenors. These efforts proceeded throughout the fall of 1984 and, on January 2, 1985, a second proposed stipulation of settlement, supported by the intervenors, was submitted to the Court. The finalized version of the stipulation of settlement was ultimately approved by the Court in *Wilder III*, over the opposition of the sectarian agencies.

The significant impact the intervenors had on the ultimate Stipulation was detailed throughout the Court's decision in *Wilder III*. For example, it was noted that:

> The Intervenors' original comments proved extremely valuable to the Court, not only because they offered a fresh perspective on the day-to-day operation of New York City's child care system from the agency clinician's point of view ..., but because their criticism of the original settlement proposal was concrete, comprehensive and constructive.

Wilder III, 645 F.Supp. at 1346.

> The intervening agencies, as non-parties vis-a-vis the underlying constitutional claims in the lawsuit, are the sole participants in this litigation who have been in a position to address freely and undistractedly the child care concerns that were prompted by the original settlement proposal. At the same time, their direct participation in the New York City foster care system, and their on-

> going contact with the children in care, give them the ability and incentive to comment authoritatively on the likely impact of the settlement on agency administrators and clinicians and on the children they serve. The Court benefitted immeasurably from the voluntary agency's perspective. The drafters of the original settlement undeniably benefitted from the intervenors' constructive criticism and suggestions.

Id. at 1350.

More specifically, the Court found the contributions made by the Intervenors were essential to the creation of the final Stipulation.

> The settlement originally presented to the Court ... was clearly problematic... The clinical concerns voiced by the intervenors and others raised serious questions in the Court's mind about both the extent to which child care issues had been fully explored ... and the extent to which the voluntary agencies had been allowed to participate meaningfully in the initial negotiations. The original settlement proposal therefore was unacceptable on several levels....
>
> The general outlines of the stipulation now before the court do not differ greatly from those of the original settlement.... Within this broad outline, however, the Stipulation reflects numerous changes--some minor, some substantial--that address virtually all of the concerns raised by the intervenors and other child care administrators ... who commented on the original settlement.

Id. at 1347-48.

The intervenors worked to promote a more viable solution to the problems presented by the foster care system in New York, while at the same time assuring that the best interests of all children in the system were taken into account. They succeeded in forestalling entry of the proposed stipulation negotiated by plaintiffs and the City which did not satisfy their objections, and prevailed, through negotiations, in their proposals to modify the settlement to ameliorate the constitutional, clinical, and practical stumbling blocks they had identified in the original stipulation.[4] While the settlement was obviously the result of more than just the work of the intervenors, they played an essential role in forging the final version of the Stipulation which was acceptable to all the parties except the sectarian agencies, and approved by this Court and the Second Circuit.

Intervenors now seek to recover attorneys' fees and costs of their work in crafting and enforcing the Stipulation.

DISCUSSION

Pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, a district court, in its discretion, may award attorneys' fees and costs to the prevailing party in any action or proceeding to enforce certain civil rights acts. 42 U.S.C. § 1988.[5] The parties do not dispute that section 1988 applies to this litigation.

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[4] Wilder III summarized twenty clinical concerns raised by intervenors to the first proposed settlement, and listed ten particularly noteworthy modifications of the settlement draft made to alleviate these concerns. *Wilder III* at 1346-49. In addition, many other points pressed by the intervenors resulted in modification of the proposed stipulation. See Affidavit of Stephen Wise Tulin, filed on March 20, 1989 at ¶ 24.

[5] Section 1988 states, in pertinent part, that:

(Footnote Continued)

A. Entitlement to Fees-Intervenors as Prevailing Parties:

The statutory language of section 1988 creates a presumption in favor of fee awards, *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985), and a prevailing party is ordinarily entitled to recover fees and costs unless there are special circumstances which would render such an award unjust. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968).

It is clear that a party may prevail for purposes of section 1988 through settlement. *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980) (consent decree which made no determination that the defendant had violated the plaintiff's constitutional rights was nonetheless sufficient to form the basis for a finding that the plaintiff was a prevailing party entitled to attorneys' fees). As noted in *Maher v. Gagne*, *supra*, 448 U.S. at 129, 100 S.Ct. at 2574, the Senate Report accompanying section 1988 stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Sen. Rep. No. 1011, 94th Cong., 2d Sees. 5 (1976), reprinted

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(Footnote Continued)

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988 has been interpreted in the same manner as the other fee-shifting provisions for particular civil rights claims which contain the "prevailing party" language. *See Independent Federation of Flight Attendants v. Zipes*, ___ U.S. ___, 109 S.Ct. 2732, 2735 n.2, 105 L.Ed.2d 639 (1989).

in 1976 U.S.Code Cong. & Admin. News, 5908, 5912. Indeed, "congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen the docket congestion' by settling cases out of court." *Evans v. Jeff D.*, 475 U.S. 717, 733, 106 S.Ct. 1531, 1540, 89 L.Ed.2d 747 (1986) (holding that section 1988 does not bar the waiver of attorneys' fees as part of a settlement) (quoting *Marek v. Chesny*, 473 U.S. 1, 10, 105 S.Ct. 3012, 3017, 87 L.Ed.2d 1 (1985)).

The Supreme Court has recently explained that a party meets the threshold requirement necessary to be considered a prevailing party under section 1988 if he or she succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Texas States Teachers Assn. v. Garland Independent School District*, ___ U.S. ___, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989) (rejecting the "central issue" test for determining an award of attorneys' fees). *See also*, *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 St.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

> The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Texas States Teachers Assoc. v. Garland Independent School District, *supra*, 109 S.Ct. at 1493.

The nature of much civil rights litigation does not lend itself to complete success by plaintiffs or defendants, and the input of intervenors may be necessary for a just remedy. While most of the cases dealing with the statutory award of attorneys' fees pursuant to section 1988 are concerned with awards to plaintiffs, an intervenor may also be a prevailing party entitled to fees and

costs. *E.g. United States v. Board of Education of Waterbury*, 605 F.2d 573, 576 (2d Cir. 1979).[6]

In *Waterbury*, an action concerning school desegregation, an organization comprised of parents and community leaders, along with several individuals, were allowed to intervene in the lawsuit after the defendants had been found liable, a consent decree had been filed and an initial desegregation plan was proposed by the defendants. Intervention was granted for the limited purpose of allowing the intervenors to protect the interests of the Hispanic community and to participate in the development of remedial measures under the consent decree. *Id.* at 574. Nonetheless, the intervenors were found to be prevailing parties, entitled to a fee award. *Id.* at 577.

The Second Circuit described the circumstances surrounding the intervention in *Waterbury* as follows:

> Intervenors entered this lawsuit to oppose a plan which unfairly burdened their constituency, and which was not being opposed by the government. In this they succeeded. They contested several later proposals, and worked in support of a plan which better served their valid interests. The

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[6] An examination of the legislative history of section 1988 readily illustrates that Congress contemplated fee awards would be available to intervenors in certain circumstances.

> In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff intervenors. However, in the procedural posture of some cases the parties seeking to enforce such rights may be the defendants and/or defendant intervenors.

S.Rep. No. 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.Code Cong. & Admin.News, 5908, 5912 n. 4.

> remedy ultimately adopted bore a substantial resemblance to the plan intervenors supported (indeed it took the same general approach) .... In light of the success of intervenors in these respects, we conclude that they come within the meaning of the term "prevailing party."

*Id.*The Second Circuit emphasized the importance of allowing intervenors to recover attorneys' fees when they further the purposes of the civil rights statutes by noting that:

> [w]ere we to interpret "prevailing party" as meaning only the party which established the liability of the defendants, or the party which proposed the plan ultimately adopted, we would severely limit the availability of attorneys' fees *to parties whose participation contributed importantly to the creation of remedies* in these cases. We would discourage activity essential to the realization of the congressional purpose of combating discrimination.

Id. at 576-77. (Emphasis added). *See also*, *Plummer v. Chemical Bank*, 592 F.Supp. 1168, 1171-72 (S.D.N.Y. 1984) (intervenors who took active role in all facets of process, including participation in hearings in which they opposed a proposed settlement, and whose efforts ultimately resulted in a consent decree which represented a fairer document for the entire class, were prevailing parties for fee award); *Morgan v. McDonough*, 511 F.Supp. 408, 413-14 (D.C. Mass. 1981) (intervening organization, which sought to vindicate the civil rights of its clients and made a significant contribution to the formulation of a workable remedy, was a prevailing party entitled to attorneys' fees.)

The City does not dispute that the intervenors made important contributions to the final Stipulation, as clearly documented in *Wilder III*, but claim they are not entitled to fees because they never alleged a violation of their own constitutional rights. The City charges that the intervenors joined the litigation only to promote their own self-interests in eliminating paperwork, modifying the system of ranking agencies, and protecting their contractual rights with the City, and that these are not interests which should be compensated under section 1988.

It is clear that the purpose of the fee-shifting statute is to encourage the vindication of civil rights, and parties who are not involved in furthering such purposes should not be entitled to benefit from the statute. *See Russo v. New York*, 672 F.2d 1014, 1022-23 (2d Cir.1982) (plaintiff who lost on civil rights claim, but prevailed on similar state law claim, was not entitled to attorneys' fees under section 1988); *Gagne v. Enfield*, 734 F.2d 902, 904 (2d Cir. 1984) (same).[7]

However, the City's contentions concerning the scope of the intervenors' participation in the litigation are not borne out by the record. The intervenors did more than just advance their own self-interests. Their participation furthered the purposes of the civil rights statutes by facilitating the formation of a settlement which would safeguard the constitutional rights of the

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[7] *Cf. Independent Federation of Flight Attendants v. Zipes, supra*, 109 S.Ct. at 2737, n.4. In *Zipes* the Supreme Court held that attorneys' fee may be assessed against a blameless intervenor who was not found liable to plaintiff only if the intervenor's action was frivolous, unreasonable, or without foundation. *Id.* at 2736. In responding to the dissent, the majority noted that this heightened standard for the award of fees might not apply if the intervenor was an intermeddler who did not intervene to protect his or her own constitutional or statutory rights. *Id.* at 2737, n. 4.

children in the City's care, while assuring that the child care system itself would remain foeused on the overall best interests of the children entitled to the protection of the civil rights laws. The contributions made by the intervenors were essential to the creation of a just and workable remedy, exactly the type of activity sought to be promoted by the civil rights statutes. *See United States v. Board of Education of Waterbury*, *supra*, 605 F.2d at 577.

Furthermore, the intervenors consistently and forcefully articulated objections addressed to the constitutional and civil rights issues in this litigation. Their efforts helped to vindicate the civil rights of the children and families in the foster care system which they served, not just their own self interests. They succeeded in obtaining modifications in the initial settlement proposal on virtually every objection they raised, and many of these modifications went directly to benefit the children in the child care system. As a result of their labor, a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote," *Texas State Teachers Assoc. v. Garland Independent School District*, *supra*, 109 S.Ct. at 1493, was effectuated. Accordingly, the Court concludes that the intervenors are prevailing parties under section 1988, entitled to an award of attorneys' fees and costs.[8]

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[8] A prevailing party is entitled to attorneys' fees and costs unless special circumstances exist to make such an award unjust. *See Newman v. Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 402, 88 S.Ct. at 966. The City defendants assert that the acceptance by plaintiffs of their offer of judgment includes compensation to plaintiffs for costs associated with litigating against the intervenors and, therefore, any further award to the intervenors from the City would result in an impermissible windfall to the intervenors. This argument is misguided. There is no indication that plaintiffs have received compensation and the City for time spent litigating against the intervenors. In any event, awarding a fair fee to the intervenor will not result in their retaining an impermissible windfall.

B. The Amount of the Fee Award:

The Supreme Court recently articulated the following summary of the legal standards for determining the amount of an appropriate fee award.

> A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, *i.e.*, "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *[Blum v. Stenson*, 465 U.S. 886, 896, n. 11, 104 S.Ct. 1541, 1547, n.11, 79 L.Ed.2d 891 (1984), and one that grants the successful civil rights plaintiff a "fully compensatory fee," [*Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983)], comparable to what is "traditional with attorneys compensated by a fee-paying client." S.Rep. No. 94-1011, p. 6 (1976), U.S.Code Cong. & Admin. News 1976, pp 5908, 5913.

Missouri v. Jenkins, ___ U.S. ___, 109 S.Ct. 2463, 2470, 105 L.Ed.2d 229 (1989).

The framework for establishing the amount of an attorneys' fees award under the federal civil rights fee shifting statute is found in the lodestar approach. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563-66, 106 S.Ct. 3088, 3097-99, 92 L.Ed.2d 439 (1986); *Hensley v. Eckerhart, supra*, 461 U.S. at 433, 103 S.Ct. at 1939. The lodestar amount is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation for each attorney involved. This calculation serves as a useful starting point for determining the amount of a reasonable fee, as it provides an objective basis on

which to make an initial estimate of the value of a lawyer's services. *Hensley v. Eckerhart*, *supra*, 461 U.S. at 433, 103 S.Ct. at 1939.

The ultimate amount of the fee must be determined on the facts of each case, *id.* at 429, 103 S.Ct. at 1937, and the lodestar amount may be adjusted based on such factors as adequate documentation of hours spent, reasonableness of hours expended, and reasonableness of rate. *See Carrero v. New York City Housing Authority*, 685 F.Supp. 904, 906 (S.D.N.Y. 1988).[9] Once the applicant for a fee award has established the reasonableness of the claimed rate and the number of hours expended, the resulting lodestar figure is presumed to be the reasonable fee to which counsel is entitled. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, *supra*, 478 U.S. at 564, 106 S.Ct. at 30; *Blum v. Stenson*, *supra*, 465 U.S. at 897, 104 S.Ct. at 15.

The intervenors seek (1) $416,052.50 in attorneys' fees relating to the substance of this litigation and an enhancement of this amount by a multiplier of 1.75 to $728,091.88; (2) $103,677.50 in attorneys' fees incurred in pursuing the fee application ("Fees for Fees"); and (3) $17,020.59 in costs. *See* Letter from Joseph M. Heppt

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[9] In calculating the lodestar, the following factors may be considered by the Court: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount of involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Hensley v. Eckerhart*, *supra*, 461 U.S. at 430, n. 3, 103 S.Ct. at 1938, n. 3; *United States Football League v. National Football League*, 887 F.2d 408 (2d Cir. 1989).

dated November 13, 1989, filed November 27, 1989.[10] The City objects to this request on a number of grounds.

First, the City argues that the intervenors have failed to supply contemporaneous time records and therefore are not entitled to recover attorneys' fees.

> All applications for attorney's fees, whether submitted by profit-making or non-profit lawyers, for any work done after the date of this opinion [June 15, 1983] should normally be disallowed

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[10] Intervenors indicate that their total fee request amounts to $810,108.50. The City, however, maintains that if the intervenors were to receive full compensation for all the time they claim plus a multiplier of 1.75, the total fee request would be $834,756.61. Affidavit of Norma Kerlin, filed November 17, 1989 at ¶ 3, n. 1. The Court's own calculations, based on the latest figures presented in the intervenors' November 13, 1989 letter, indicate that the total fee request, exclusive of costs, amounts to $831,-769.38.

This sum was calculated as follows:

1. Opposition to the proposed stipulation and negotiating the final stipulation:	$350,740.00
2. Defense of the Stipulation on appeal:	$28,403.75
3. Enforcement of the Stipulation, including opposition to the initial City RFP:	$ 36,908.75
Total (excluding Fees for Fees)	$416,052.50
Total (excluding Fees for Fees) enhanced by a multiplier of 1.75:	$728,091.88
5. Fees for Fees:	
(a)Up to March 17, 1989:	$68,872.50
(b)From March 17, 1989 to November 13, 1989:	$34,805,00
	$103,677.50
Total Fee Request:	$831,769.38

> unless accompanied by contemporaneous time records indicating, for each attorney, the date, the hours expended, and the nature of the work done.

New York State Association for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1154 (2d Cir. 1983). Contemporaneous time records are necessary so that the Court is not faced with an impossible task when asked to determine an appropriate fee amount, and lawyers are not required to expend even more time reconstructing the past in assembling the fee application. *Id.* at 1147-48. The burden to present such records to the Court rests squarely on the party requesting remuneration. *Hensley v. Eckerhart*, *supra*, 461 U.S. at 437, 103 S.Ct. at 19; *Carrero v. New York City Housing Authority*, *supra*, 685 F.Supp. at 909.

Intervenors submitted verbatim transcriptions of the daily entries made in the diaries of every attorney, paralegal and summer associate who worked on this case. Exhibit C annexed to Affidavit of Donald J. Cohn, filed September 15, 1989; Exhibit 7 annexed to Affidavit of Stephen Wise Tulin, filed September 1, 1989. The original diaries have not been presented to the Court.[11] Lead counsel for the intervenors, Donald J. Cohn ("Cohn") and Stephen Wise Tulin ("Tulin"), have attested to the fact that the documentation presented to the Court

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[11] The intervenors maintain that the original diary entries were not produced because these diaries contain confidential billing information regarding other clients. The intervenors claim they offered to work out an arrangement whereby the City would have been allowed access to the diaries in order to randomly check entries, but the City did not respond to this suggestion. Affidavit of Donald J. Cohn, filed September 15, 1989 at ¶ 4. The intervenors also state that they would have produced redacted versions of the original diary entries if the City had agred to bear the cost of this procedure. *Id.*

concerning the amount and the description of the time spent by the intervenors' attorneys consisted of the actual entries as they appeared in the daily diaries of the individuals in question, not summaries or reconstructions of these entries. Affidavit of Donald J. Cohn, filed September 15, 1989 at ¶¶ 5-7; Affidavit of Stephen Wise Tulin, filed September 1, 1989 at ¶ 8. *See also*, Affidavit of Joseph M. Heppt, filed September 1, 1989 at ¶ 7. Based on these assurances, the Court concludes that the intervenors have satisfied the requirement of producing contemporaneous billing records. *Cf. United States Football League v. National Football League*, 704 F.Supp. 474, 477 (S.D.N.Y.) (re-typed computer records satisfied contemporaneous time record requirement), *aff'd*, 887 F.2d 408, 415 (2d Cir. 1989).

Second, the City argues that the intervenors are not entitled to enforce the Stipulation and, therefore, should not be entitled to fees after December 19, 1985, when the executed consent decree was filed with the Court. The Court disagrees. The Stipulation, to which the intervenors are signatory parties, gives them the right to ensure that those terms which affect their interests are properly implemented. Paragraph 75 of the Stipulation provides that plaintiffs shall exercise reasonable efforts to ascertain whether voluntary compliance can be obtained prior to seeking judicial redress for alleged noncompliance by defendants with the terms of the Stipulation. This provision, contrary to the City's assertions, does not exclude the intervenors from enforcing the Stipulation. Accordingly, the intervenors' claim for fees did not terminate upon filing the Stipulation with the Court.

Third, the City contends that it is not liable for any attorneys' fees incurred by the intervenors in defending the Stipulation on appeal. On this point, the Court

agrees. The appeal was filed solely by the sectarian agencies. The Court does not believe it would be reasonable to require the City, a signatory party to the Stipulation, to be responsible for any of the fees expended in defending the Stipulation against appellate challenge by parties over whom the City had no control. Accordingly, the $28,403.75 in attorneys' fees claimed by the intervenors in connection with the appeal will be excluded from the fee award.

Next, the City challenges the hourly rates sought by intervenors. The intervenors have requested hourly rates which are equivalent to the actual rates billed by their counsel to paying clients during the relevant time periods. Nonetheless, the City challenges these rates as excessive. In determining the elements of reasonable attorneys' fees, courts have consistently looked to the marketplace as a guide, *Missouri v. Jenkins*, *supra*, 109 S.Ct. at 2470, and in determining whether the requested rates fall within the prevailing market rates, "rates charged in private representations may afford relevant comparisons." *Blum v. Stenson*, *supra*, 465 U.S. at 896, n. 11, 104 S.Ct. at 1547, n. 11.

The intervenors are entitled to a reasonable hourly rate calculated in accordance with the prevailing marketplace rates in the New York community for lawyers of similar experience and reputation engaged in similar litigation. The hourly rate actually charged to clients by an attorney is a strong indication of the prevailing market rate for that attorney's work, which implicitly accounts for the attorney's skill and reputation in the community. *See Laffey v. Northwest Airlines*, 746 F.2d 4, 24 (D.C. Cir. 1984) (rate actually charged by a prevailing party's counsel in private practice will provide fair compensation when used in determining a fee award as long as the rate falls within the range of rates charged by other

firms in the community for similar work), *cert. denied*, 472 U.S. 1021, 105 S.Ct. 3488, 87 L.Ed.2d 622 (1985); *Barcia v. Sitkin*, 683 F. Supp. 353, 357 (S.D.N.Y. 1988) (in determining reasonable hourly rate, court would look first to any existing schedule of fees charged by counsel for services performed in previous or other cases); *Berkman v. City of New York*, No. 79-1813, slip op. at 9-10 (S.D.N.Y. November 25, 1985) (annexed as Appendix 1 to the City's Memorandum of Law, filed August 11, 1989). Still, the rate an attorney charges paying clients is not necessarily the rate which should be compensated under section 1988, because the services required by nonpaying clients may well differ from those required by paying clients. *See McCann v. Coughlin*, 698 F.2d 112,130 (2d Cir. 1983).

The Court concludes that the hourly rates charged by Polier, Tulin, Clark and Zalk for Tulin's time in this litigation are appropriate, as they fall well within the range of hourly rates charged by partners at major law firms in Manhattan during the relevant time periods. *See* Exhibits K, L, O, P annexed to Affidavit of Marcia Robinson Lowry, filed February 24, 1989. These rates are especially reasonable given the amount of experience lead counsel for the intervenors brought to this case.[12]

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[12] Tulin graduated from Yale Law School in 1954, cum laude, Order of Coif, having been Comment Editor of the Yale Law Journal. He clerked for the Honorable Edward Weinfeld of the Southern District of New York in 1954 and 1955. He has been a member of the bar for 34 years, and a partner in his current firm since 1961. Among his other activities, Tulin has been involved in the legal aspects of child care for more than twenty-five years, acting as general counsel to Louise Wise Services since 1976, and has assisted in drafting certain laws regarding family law and child care in New York State. Affidavit of Stephen Wise Tulin, filed March 20, 1989 at ¶¶ 2-6. Cohn is a 1955 graduate of Yale Law School where he was an editor of the Yale Law Journal. Upon graduation

(Footnote Continued)

The intervenors have sought to charge Cohn's time at higher rates than those charged for Tulin's, presumably based on the differences in their respective firm's actual charges, not the contributions made by each to the settlement. The Court finds that the hourly rates requested by Tulin most reasonably reflect the prevailing rate for such work in the relevant legal community. Accordingly, the Court will adjust Cohn's hourly rates to the same level as those rates requested by Tulin.[13]

The City has also attacked as inflated the hourly rates of Tracy Miller, Seth Lahn and S.A. Lewis, three

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(Footnote Continued)

he entered private practice with the firm now known as Webster & Sheffield, and has remained with that firm to the present time, with the exception of several years spent in the United States Attorney's Office for the Southern District of New York. Webster & Sheffield has represented the Children's Aid Society and Cohn asserts that he has been involved in several child care matters during his time in private practice. Affidavit of Donald J. Cohn, filed March 20, 1989 at ¶¶ 20-21.

[13] The rates charged for Tulin's time and the rates charged for Cohn's time are set forth below.

Year	Tulin's Hourly Rate	Cohn's Hourly Rate
1984	200.00	250.00
1985	225.00	250.00
1986	225.00	300.00
1987	250.00	300.00
1988	250.00	325.00
1989	250.00	325.00 and 350.00

The value of Cohn's time on the substance of this litigation, at rates adjusted to comport with those charged by Tulin, is calculated below. The rates and amount of compensation requested by the intervenors appear in parentheses.

(Footnote Continued)

associates for Webster & Sheffield who were involved in this litigation on behalf of the intervenors. The rates charged by the intervenors for these individuals, as well as the rates charged for the time expended by other associates and paralegals for whom the intervenors seek compensation, are also the actual rates intervenors' counsel charged to paying clients.[14] These rates fall within the parameters of the hourly rates charged by similar firms in New York City for associates and the Court finds them to be reasonable. Accordingly, no adjustment will be made to these rates.

Finally, the City contends that the intervenors have not met their burden of showing that all the hours for which they seek compensation are properly documented, or that they exercised appropriate billing judgment in incurring the number of hours expended on this litigation. The Supreme Court in *Hensley* has outlined certain prerequisites for determining the amount of a reasonable fee.

> The party seeking an award of fees should submit evidence supporting the hours worked and the rates claimed. Where the documentation of

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(Footnote Continued)

Year	Hours	Rate $	Amount $
1984	279.00	200.00	55,800.00
		(250.00)	(69,750.00)
1985	15.25	225.00	3,431.25
		(250.00)	(3,812.50)
1986	17.50	225.00	3,937.50
		(300.00)	(5,250.00)

[14] The City has not challenged the hourly rates charged by the other associates, summer associates and paralegals included in the intervenors' fee request. Instead, the City maintains that none of the time these additional individuals expended is compensable.

> hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." [citation omitted] Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in a private practice is ethically obligated to exclude such hours form his fee submission. "In the private sector, 'billing judgment' is an important consideration in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." [citation omitted]

Hensley v. Eckerhart, *supra* 461 U.S. at 434, 103 S.Ct. at 1939 (emphasis in original).

The time records submitted by the intervenors concerning work performed on the substance of this litigation support, to a large extent, the amount of their attorneys' fees request. A great majority of the entries are sufficiently documented and reflect reasonable expenditures of time given the issues and the circumstances surrounding negotiating and enforcing the Stipulation. The City, however, has identified a number of entries in the time records which fail adequately to describe the nature of the work performed. These entries are too vague to merit compensation. *See United States Football League v. National Football League*, *supra*, 704 F.Supp. at 477 (vagueness in documentation of time records will result in a 10% reduction in the fee award).

In addition, it is apparent upon inspection of the time records that an excessive amount of time was spent by the intervenors' counsel participating in conferences with clients and co-counsel. While the Court acknowledges the logistical problems involved in serving nineteen child care agency clients, not all of the conferences between counsel should be borne as an expense by the City. Similarly, the participation of both lead counsel for the intervenors at the same time was essentially duplicative, although much of this duplication was mitigated by the division of work between counsel.[15] It is proper to reduce a fee request when a party seeks compensation for efforts which essentially duplicated another attorney's work. *New York Association for Retarded Children v. Carey, supra*, 711 F.2d at 1146. Furthermore, the intervenors initially adopted certain positions in opposition to the proposed stipulation which were later abandoned, including a challenge to this Court's authority to grant relief that would substantially alter the child care system in New York City. *See* Exhibits C, D & E, annexed to Affidavit of Marcia Robinson Lowry, filed June 8, 1989. Time spent on these issues does not merit compensation under section 1988. Accordingly, the Court believes it is appropriate to reduce the amount of the fee request by twenty percent, from $368,892.00[16] to $295,113.60.

The intervenors argue that an enhancement of the fee award by a multiplier of 1.75 is appropriate given

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[15] Tulin focused on the clinical aspects of the issues involved with the child care system and Cohn concentrated on the constitutional concerns raised by the Stipulation. *See* Affidavit of Donal J. Cohn, filed March 20, 1989 at ¶ 20.

[16] This figure represents the amount sought for work on this litigation less the amount spent on defending the Stipulation on appeal and adjusted to reflect the Court's modification of Cohn's billing rate.

their degree of success in opposing the initial proposed stipulation and negotiating the final Stipulation. The Supreme Court has explained that an enhancement of a fee award is proper only in certain rare and exceptional cases. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, *supra*, 478 U.S. at 565, 106 S.Ct. at 3098; *Blum v. Stenson*, *supra* 465 U.S. at 898-901, 104 S.Ct. at 1548-50. *See also Krieger v. Gold Bond Building Products*, 863 F.2d 1091, 1099 (2d Cir. 1988). The purpose of the fee-shifting statute is not exactly to replicate a private fee arrangement but to ensure that private parties will be able to retain counsel to further the objectives of the civil rights statutes. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, *supra*, 478 U.S. at 565, 106 S.Ct. at 3098. The applicant bears the burden of overcoming the presumption that the lodestar reflects a reasonable fee award and establishing that an enhancement is appropriate. *See Soler v. G & U, Inc.*, 658 F. Supp. 1093, 1102-03 (S.D.N.Y. 1987).

In the context of this case, the Court does not view an enhancement over and above the reasonable fee assessed as warranted based on the success of the intervenors. The intervenors, plaintiffs and the City all ultimately collaborated to create the Stipulation approved by the Court. The significant contributions of the intervenors to the creation of the Stipulation and the expertise and skillful advocacy added to the litigation by intervenors' counsel were important ingredients in achieving the results obtained, but are factors which have been taken into consideration in arriving at the adjusted fee award.

Intervenors' counsel have indicated to the Court that they had no retainer agreements with their clients concerning this litigation, and argue that this created a risk of loss which justifies an enhancement of the fee

award. Affidavit of Stephen Wise Tulin, filed September 1, 1989, at ¶ 7. In and of itself, however, a contingency arrangement is not a sufficient basis for increasing the amount of the fee award above the lodestar. *Lewis v. Coughlin*, 801 F.2d 570, 575 (2d Cir. 1986). The risk of loss does not merit an enhancements in this case, because the intervenors have not even attempted to show that without the possibility of enhancement competent counsel might have refused to represent then, thereby denying them effective access to the courts. *See Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir.1987).

One additional factor to be considered in determining whether to enhance a fee award is delay in payment, because compensation received several years after services were rendered is not equivalent to the same compensation received at the time the services were performed. *Missouri v. Jenkins*, *supra*, 109 S.Ct. at 2469. The Court is mindful of the need to insure effective access to judicial process and the importance of not penalizing attorneys who choose to represent parties in complex and lengthy litigation which furthers the purposes of the civil rights laws. In the Court's view, however, the amount of the fee award granted intervenors provides then with full compensation.

Intervenors are also entitled to compensation for the attorneys fees incurred in preparing the fee application, see *New York Association for Retarded Children v. Carey*, *supra*, 711 F.2d at 1148, but the amount of remuneration sought for Fees for Fees in this case must be reduced. Intervenors seek $103,677.50 for work performed on the fee application, approximately twenty-five percent of their total requested fee award. This figure overstates the amount reasonably recoverable. The City argues that the number of individuals involved in the fee

application was excessive, much of the work performed by these individuals was duplicative, some of the time attributed to the fee application against the City included time spent litigating against the sectarian agencies and plaintiffs regarding fees, and much of the time requested is inadequately documented. The Court concurs with at least some of these objections, noting, in particular, the large number of individuals involved in preparing the application, the time these individuals expended familiarizing themselves with the case, and the inadequate descriptions accompanying certain of the time entries. In addition, there were several discrepancies in the figures asserted in the fee application materials presented by the intervenors.[17] Moreover, the intervenors seek considerable reimbursement for time involved with purely administrative tasks that was billed at relatively high rates. Accordingly, the Court believes it is appropriate to reduce the amount sought in connection with the fee application by forty percent, from $100,458.751[18] to $60,275.25.

The intervenors seek $17,020.59 in costs. They have submitted summaries of the expenses they allegedly incurred in this case, but failed to submit detailed documentation of the reimbursement request. *See In re*

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[17] Compare, Affidavit of Stephen Wise Tulin, filed September 1, 1989 at ¶ 2(b)2, with Affidavit of Donald J. Cohn, filed March 20, 1989 at ¶¶ 27-29 and Affidavit of Joseph M. Heppt, filed September 1, 1989 at ¶ 5 (all presented slightly different summaries of the amounts sought by the intervenors). See also, Schedule C, annexed to Letter from Joseph M. Heppt dated November 13, 1989, filed November 27, 1989 (total value of Cohn's time was slightly miscalculated, and total value of additional time spent on fee application was tallied incorrectly); Schedule B, annexed to id.

[18] This figure represents the amount sought for the fee application, adjusted to reflect Cohn's modified billing rate.

Agent Orange Product Liability Litigation, 611 F.Supp, 1296, 1314 (E.D.N.Y.1985) *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987). Indeed, for certain of the expenditures, the intervenors admit that documentation is not available, and no reconstruction of these expenses has been undertaken. The disbursement incurred by a prevailing party's counsel may be compensated when these expenditures add to the proceeding, and are not part of the attorneys' ordinary overhead. *Carrero v. New York City Housing Authority, supra*, 685 F.Supp. at 909. Due to the inadequate documentation concerning the expenses, the Court is unable to ascertain precisely how much of these costs are compensate. Accordingly, the Court will likewise reduce the amount of compensable disbursements by forty percent, from $17,020.59 to $10,212.35.

CONCLUSION

The intervenors are prevailing parties under section 1988, entitled to an award of attorneys' fees in the amount of $355,338.85 and disbursements in the amount of $10,212.35.

Settle order on notice.